

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

76-6025

IN THE
United States Court of Appeals
For the Second Circuit.

MODULAR TECHNICS CORPORATION,
Plaintiff-Appellant,

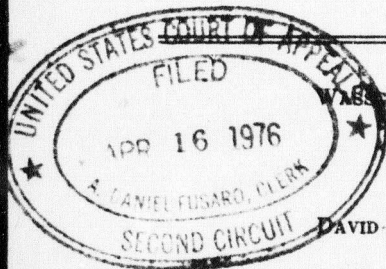
against

UNITED STATES DEPARTMENT OF HOUSING & URBAN DE-
VELOPMENT and FEDERAL HOUSING ADMINISTRATION,
Defendants-Appellees,

SOUTH HAVEN HOUSES HOUSING DEVELOPMENT FUND
COMPANY, INC., and CHEMICAL BANK,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

JOINT APPENDIX.



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1a

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MODULAR TECHNICS CORPORATION,

Plaintiff-Appellant,

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UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOP-
MENT AND FEDERAL HOUSING ADMINISTRATION,

Defendants-Appellees,

SOUTH HAVEN HOUSES HOUSING DEVELOPMENT FUND COM-
PANY, Inc., and CHEMICAL BANK,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK.

Docket Entries.

Year

1974

- | | | |
|------|----|---|
| Oct. | 3 | Petition for Removal filed (Supreme Court/
Nassau) |
| Oct. | 24 | By Platt, J.—Order dated 10-23-74 extending
time for federal debts to 11-8-74 filed. |
| Jan. | 4 | Notice of Motion, ret. 11/15/74 filed ret. for
an order dismissing the complaint. |
| Jan. | 4 | Memorandum of Law in Support of Motion to
Dismiss filed. |

Docket Entries

- Jan. 4 Answer of Chemical Bank filed.
- Jan. 4 Interrogatories to plttf of deft Chemical Bank filed.
- Jan. 15 Before Platt, J.—Adjd to 12/6/74.
- 1975
- Jan. 8 By Platt, J.—Order dated 1/6/75 filed that the time of the plttf to answer the interrogatories of deft Chemical Bank is extended to Feb. 6, 1975, etc.
- Jan. 24 Before Platt, J.—Case called—Adjd to 2/7/75.
- Feb. 14 Summons issued 1-17-75 to deft South Haven Houses. Summons ret and filed/unexecuted.
- Mar. 25 Notice of motion and memorandum of law for an order directing plttf to answer interrogatories, etc., ret 4-4-75 at 10 A.M. filed.
- Apr. 18 By Platt, J.—Order dtd 4-17-75 adjourning motion to compel answers to interrogatories to 5-23-75 at 10 A.M. filed.
- May 27 Before Platt, J.—Case called—No appearances —Motion granted.
- June 18 Clerk's order allowing personal service of supplemental summons and complaint filed.
- June 18 Supplemental summons issued.
- June 24 Supplemental summons returned and filed/executed/
- July 1 By Platt, J.—Stipulation dtd 6-21-75 adjourning the motion of Chemical Bank ret 5-23-75 without date filed.
- Nov. 18 By Platt, J.—Opinion & Order dtd 11-18-75 dismissing the complaint against HUD and FHA filed. Copies of opinion mailed to parties.
- Dec. 15 Notice of appeal filed. Copy sent to C of A, all counsel etc.

Docket Entries

1976

- Jan. 22 Judgment that the complaint against the depts
HUD and FHA are dismissed filed.
- Jan. 22 By Platt, J.—Order that final judgment be en-
tered dismissing the complaint as to HUD &
FHA filed.
- Jan. 26 Notice of appeal filed. Copy mailed to C of A
& us Atty.
- Feb. 13 Certified copy of Order recd and filed from the
C. of A. that the above appeal is withdrawn,
etc. (JN)
- Mar. 4 Copy of civil appeals scheduling order #1
filed.

Complaint.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

MODULAR TECHNICS CORP.,

Plaintiff,

against

SOUTH HAVEN HOUSES HOUSING DEVELOPMENT FUND COMPANY, Inc., CHEMICAL BANK, U. S. DEPARTMENT OF HOUSING and URBAN DEVELOPMENT, and FEDERAL HOUSING ADMINISTRATION,

Defendants.

The plaintiff, by its attorneys, Wasserman, Chinitz, Geffner & Green, as and for its complaint, alleges:

FOR A FIRST CAUSE OF ACTION

1. That at all time herein mentioned the plaintiff was and still is a domestic corporation with offices and principal place of business at 5000 Brush Hollow Road, Westbury, County of Nassau, State of New York.

2. That upon information and belief, at all times herein mentioned, the defendant, South Haven Houses Housing Development Fund Company, Inc., (hereinafter referred to as "South Haven") was and still is a domestic corporation with offices and principal place of business at 2503 Third Avenue, County of Bronx, State of New York.

3. That upon information and belief, at all times herein mentioned the defendant, Chemical Bank, was and still is a corporation organized and existing under and pursuant to the provisions of the Banking Law of the State

Complaint

of New York, engaged in business as a bank, with its principal office in the City, County and State of New York.

4. That upon information and belief, at all times herein mentioned, the defendant, U. S. Department of Housing and Urban Development was and still is a department of the United States Government (hereinafter referred to as "HUD").

5. That upon information and belief, at all times herein mentioned, the defendant, Federal Housing Administration, was and still is a public corporation and corporate governmental agency duly organized and existing under and pursuant to the laws of the United States (hereinafter referred to as "F.H.A.").

6. That heretofore and on or about August 2, 1972, certain written agreements were entered into wherein and whereby plaintiff agreed to provide certain work services and materials for the construction of a multiple dwelling project upon the premises owned by the defendant, South Haven, in accordance with certain conditions agreed to by the defendants, South Haven, Chemical Bank and F.H.A. in consideration for which the plaintiff would receive and be paid certain monies by the defendant, South Haven.

7. The plaintiff commenced the work and supplied services and material under and pursuant to its agreement and duly performed all the conditions of such agreement on its part to be performed except as prevented, waived, or excused by the defendants, or such of them as might prevent, waive or excuse performance of conditions of such agreement, until breach thereof by the defendants, as hereinafter set forth, and was at all times herein ready, willing and able to duly perform such agreement, if defendants had not breached the same.

Complaint

8. That the agreed price and reasonable value of the labor, services and materials actually furnished by the plaintiff pursuant to said agreements including profit is the sum of \$4,550,381.00 no part of which has been paid except the sum of \$3,991,644.00 leaving a balance due and owing of \$553,702.00, no part of which has been paid although duly demanded.

FOR A SECOND CAUSE OF ACTION

9. That plaintiff realleges the allegations contained in paragraphs numbered "1" through "7" of the complaint as fully as though the same were herein set forth in their entirety.

10. That plaintiff performed work, labor and services and furnished materials at the special instance and request of the defendants, to take care of changes to and additional changes to meet municipality requirements and take care of unforeseen and extraordinary sub-surface conditions of the agreed amount and reasonable value of \$239,332.37, no part of which has been paid although duly demanded.

FOR A THIRD CAUSE OF ACTION

11. That plaintiff realleges the allegations contained in paragraphs numbered "1" through "7" of the complaint as fully as though the same were herein set forth in their entirety.

12. That plaintiff performed work, labor and services and furnished materials at the special instance and request of the defendants, in the nature of rework to take care of damage due to vandalism of the agreed amount and reasonable value of \$224,720. no part of which has been paid although duly demanded.

Complaint

FOR A FOURTH CAUSE OF ACTION

13. That plaintiff realleges the allegations contained in paragraphs numbered "1" through "7" of the complaint as fully as though the same were herein set forth in their entirety.

14. That the defendants, South Haven and F.H.A. represented and warranted that plaintiff would be able to perform its part of its agreements in accordance with the facts and conditions as disclosed by various plans and specifications provided and prepared by the said defendants, their respective servants, agents or employees.

15. That, in entering into its agreement with the defendant, south Haven, the plaintiff relied upon the facts and conditions as represented by such plans and specifications.

16. That such plans and specifications were inaccurate and/or erroneous in that they did not disclose various municipality requirements and sub-surface conditions which thereafter presented themselves.

17. That plaintiff performed work, labor and services and furnished materials at the special instance and request of the defendants to take care of such municipality requirements and sub-surface conditions.

18. That, in addition to the cost of such work, labor and services and materials and solely by reason of the aforementioned misrepresentations of facts and conditions the plaintiff sustained additional costs due to out-of-phase construction, work interference and delay resulting from such municipality requirements and sub-surface conditions in the amount of \$130,936.00 no part of which has been paid although duly demanded.

Complaint

FOR A FIFTH CAUSE OF ACTION

19. That plaintiff realleges the allegations contained in paragraphs numbered "1" through "7" of the complaint as fully as though the same were herein set forth in their entirety.

20. That the defendant, South Haven, refused and neglected to perform various terms and conditions of the said agreements on its part to be done and performed, having failed and neglected to:

(a) compensate the plaintiff for the cost of work and extra work performed and materials and extra materials and services supplied to meet municipality requirements and unforeseen and extra-ordinary sub-surface conditions;

(b) compensate the plaintiff for the profit, overhead, and general requirements which the plaintiff is entitled under its agreements;

(c) compensate the plaintiff for costs due to out-of-phase construction, work interference and delay due to municipality requirements and unforeseen and extra-ordinary sub-surface conditions and due to its failure to compensate the plaintiff for items 10(a) and 10 (b);

(d) provide insurance coverage as required by agreement;

(e) adjust, settle and obtain payment for and/or refused and continues to refuse to sign over monies due for insurance losses sustained during the course of plaintiff's work and labor to compensate the plaintiff for work performed and to be performed and materials and services supplied and to be supplied although all of the aforesaid is now or will be due and owing.

21. That at the time of breach of said agreements by the defendant, South Haven, the plaintiff had so far completed performance of the terms and conditions on its

Complaint

part to be performed that the project was constructed to the point where four (4%) per cent or less, remained to be completed.

22. That because of the non-performance on the part of defendant, South Haven, as aforesaid the plaintiff has a right to and did declare the agreements between them terminated.

23. That by virtue of such non-performance on the part of the defendant, South Haven, the plaintiff has sustained damage in the sum of \$5,000,000.00.

FOR A SIXTH CAUSE OF ACTION

24. That plaintiff realleges the allegations contained in paragraphs numbered "1" through "7" of the complaint as fully as though the same were herein set forth in their entirety.

25. That in consideration of the plaintiff supplying such services and materials to and performing such work for the defendant, South Haven, the defendant, Chemical Bank, promised and agreed to lend to the defendant, South Haven, such monies as needed and/or required to pay the plaintiff for the services and materials supplied and work performed.

26. That upon information and belief the said defendant, Chemical Bank, has failed and refused to perform the conditions of its agreement on its part and has failed to lend to the defendant, South Haven, monies sufficient to pay the plaintiff for services and materials supplied and work performed, the exact amount of which is not known at this time.

27. That upon information and belief because of the non-performance on the part of defendant, Chemical Bank, as aforesaid the defendant, South Haven, had in-

Complaint

sufficient monies and was and still is unable to pay plaintiff for the services and materials supplied and work performed.

28. That by virtue of such non-performance on the part of the defendant, Chemical Bank, the plaintiff has sustained damage in the sum of \$5,000,000.00.

FOR A SEVENTH CAUSE OF ACTION

29. That plaintiff realleges the allegations contained in paragraphs numbered "1" through "7" of the complaint as fully as though the same were herein set forth in their entirety.

30. That heretofore and in or about August, 1972, the defendants, South Haven and Chemical Bank, for the purpose of inducing the plaintiff to enter into the aforesaid agreements with the defendant, South Haven, did represent to the plaintiff that the defendant, South Haven, would have at all times, sufficient and ready monies to pay to the plaintiff for materials and services supplied and work performed by the plaintiff in connection with the construction and erection of the aforementioned project.

31. That in reliance upon such representations the plaintiff did enter the aforesaid agreement with the defendant, South Haven and supplied certain materials and services and perform certain work.

32. That upon information and belief, the defendants, South Haven and Chemical Bank, at all times herein knew that the defendant, South Haven, had and/or would have insufficient monies to pay the plaintiff for the materials and services supplied and work performed.

33. That upon information and belief, the said representations so made were known by the said defendants to be false when made and were made with intent to deceive the plaintiff.

Complaint

34. That Plaintiff at the time such representations were made did not know the truth and believed the said representations to be true.

35. That by reason of the aforesaid the plaintiff had a right to cancel its agreements with the defendant, South Haven and was damaged in the sum of \$5,000,000.00.

FOR AN EIGHTH CAUSE OF ACTION

36. That plaintiff realleges the allegations contained in paragraphs numbered "1" through "7" of the complaint as fully as though the same were herein set forth in their entirety.

37. That heretofore, and upon time to time subsequent to August, 1972, the defendants, South Haven and Chemical Bank, for the purpose of inducing the plaintiff to supply extra and/or additional materials and services and perform extra and/or additional work for the defendant, South Haven, did represent to the plaintiff that the defendant, South Haven, would, at all times have sufficient and ready monies to pay to the plaintiff for such materials, services and work.

38. That in reliance upon such representations the plaintiff did supply such additional and/or extra materials and services and perform such additional and/or extra work.

39. That upon information and belief the defendants, South Haven, and Chemical Bank at all times herein knew that the defendant, South Haven had and/or would have insufficient monies to pay to the plaintiff for the said materials and services supplied and work performed.

40. That upon information and belief the said representations so made were known by the said defendants to be false when made and were made with intent to deceive the plaintiff.

Complaint

41. That plaintiff at the time such representations were made did not know the truth and believed the said representations to be true.

42. That by reason of the aforesaid the plaintiff had a right to cancel its agreements with the defendant, South Haven and was damaged in the sum of \$5,000,000.00.

FOR A NINTH CAUSE OF ACTION

43. That plaintiff realleges the allegations contained in paragraphs numbered "1" through "7" of the complaint as fully as though the same were herein set forth in their entirety.

44. That at the time the agreement between plaintiff and defendant, South Haven, was entered into, the defendant, F.H.A. was acting for and on behalf of the defendant, South Haven as its agent or quasi-agent.

45. That the language content and forms of agreement between plaintiff and defendant, South Haven, were prepared, negotiated, used and/or insisted upon being used by the defendant, F.H.A.

46. That the agreement between plaintiff and defendant, South Haven, provided for the payment of additional monies for extra work, services and materials performed and supplied by the plaintiff.

47. That at the time the agreement between plaintiff and defendant, South Haven, was entered into, the defendant, F.H.A. represented to the plaintiff that additional compensation would be paid for extra work, services and materials performed and supplied.

48. That plaintiff relied upon such representations by the defendant, F.H.A., and was induced thereby to enter into the aforesaid agreement with the defendant, South Haven.

Complaint

49. That upon information and belief, the defendant, F. H. A. never intended that additional compensation for extra work, services and materials performed and supplied by the plaintiff in the construction and erection of the project be provided for and/or paid to the plaintiff.

50. That upon information and belief, the defendant, F. H. A. at the time it made the aforesaid representations and at the time it negotiated the agreement between plaintiff and defendant, South Haven, and at the time the agreement between the plaintiff and the defendant, South Haven, was entered into, knew that it never intended that additional compensation for extras be provided for and/or paid to the plaintiff.

51. That, to cover-up and conceal such misrepresentations the defendants, F.H.A., and HUD did during the course of construction undertake a certain course of action and/or non-action and cause under duress, the plaintiff to withhold and/or delay submitting applications for such additional compensation.

52. That by reason thereof, the plaintiff has been damaged in the sum of \$6,153,369.00.

FOR A TENTH CAUSE OF ACTION

53. That plaintiff realleges the allegations contained in paragraphs numbered "1" through "7" of the Complaint as though the same were herein set forth in their entirety.

54. That plaintiff's agreement with defendant, South Haven, contemplates and/or provides for limited amounts of monies to be expended for safeguarding the project against vandalism and theft.

55. That upon information and belief, at the time the agreement between plaintiff and defendant, South Haven, was entered into, the existence of certain material facts

Complaint

concerning the extent and degree of theft and vandalism in the area to which the project could reasonably be expected to be subjected to and of which plaintiff had no knowledge, was well known to the defendant, F.H.A.

56. That, moreover, although the defendant, F. H. A., well knew that the plaintiff was unaware of the existence of such material facts concerning theft and vandalism, the defendant, F. H. A. did refrain from disclosing its existence to the plaintiff and by virtue of its quasi-agency relationship with the defendant, South Haven, did impliedly represent the absence or non-existence of such material facts.

57. That plaintiff, in reliance upon such representations was induced to and did enter the aforesaid agreement with the defendant, South Haven.

58. That upon information and belief, the defendant, F. H. A. at all times herein knew that the aforesaid agreement between the defendant, South Haven, and the plaintiff contained insufficient provision for safeguarding the project against theft and vandalism.

59. That when in fact such theft and vandalism did take place, the defendant, F. H. A., failed and refused and continues to fail and refuse to provide and/or allow the defendant, South Haven, to provide for additional compensation so as to permit and allow the plaintiff to provide additional and/or other safeguards, which additional compensation has been duly demanded by the plaintiff.

60. That notwithstanding the aforesaid misrepresentation the plaintiff has attempted to provide all reasonable safeguards.

61. That notwithstanding the aforesaid, the only reasonably sure and appropriate safeguard was and is the occupancy of the subject project by its tenants.

Complaint

62. That notwithstanding the aforesaid, the defendant, F. H. A. has failed and refused to permit, and continues to fail and refuse to permit such occupancy.

63. That as a result of the aforesaid, the plaintiff has sustained damage in the sum of \$5,000,000.00.

FOR AN ELEVENTH CAUSE OF ACTION

64. That plaintiff realleges the allegations contained in paragraphs numbered "1" through "7" of the complaint as fully as though the same were herein set forth in their entirety.

65. That the plaintiff, through its efforts, work performed and materials and services supplied as aforesaid was and still is the owner and rightfully entitled to certain monies held back and accumulated by the defendant, South Haven, during the course of the construction work heretofore mentioned in the sum of \$449,020.00.

66. That the plaintiff has duly demanded of the defendant, South Haven, that part or all of the aforesaid monies be paid to the plaintiff that the said defendant has refused and still refuses to pay over the same.

67. That upon information and belief the defendants have conspired and arranged between them to hire and engage another contractor to complete the construction work heretofore mentioned and have distributed and converted or are about to distribute and convert part or all of the aforesaid monies held back and accumulated for the plaintiff to pay for such completion of work all to plaintiffs damage in the sum of \$449,020.00.

WHEREFORE, plaintiff demands judgment, as follows:

1: In the sum of \$553,702.00 on the first cause of action against the defendant, South Haven; and

Complaint

2: In the sum of \$239,332.37 on the second cause of action against the defendant, South Haven, Chemical Bank, F.H.A. and HUD; and

3: In the sum of \$224,720.00 on the third cause of action against the defendants, South Haven and Chemical Bank, F.H.A. and HUD; and

4: In the sum of \$130,936.00 on the fourth cause of action against the defendants, South Haven and F.H.A. and

5: In the sum of \$5,000,000.00 on the fifth cause of action against the defendant, South Haven; and/or

on the sixth cause of action against the defendant, Chemical Bank; and/or

on the seventh cause of action against the defendants, South Haven and Chemical Bank; and/or

on the eighth cause of action against the defendants, South Haven and Chemical Bank; and/or

on the tenth cause of action against the defendant, F.H.A.; or in the alternative, in the sum of \$6,153,369.00 on the ninth cause of action against the defendants, South Haven and HUD and F.H.A. and

6: In the sum of \$449,020.00 on the eleventh cause of action against the defendant, South Haven; together with interest on the sums recovered on each of the aforesaid causes of action from the date or dates each of said sums became due, together with the costs and disbursements of this action.

WASSERMAN, CHINITZ, GEFFNER & GREEN
Attorneys for Plaintiff
Office & P. O. Address
5000 Brush Hollow Road
Westbury, New York 11590
telephone: 516) 333-6622

Notice of Motion.**UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK****SIRS:**

Please Take Notice that upon the annexed affidavit of Douglas J. Kramer Assistant United States Attorney in the office of David G. Trager, United States Attorney and upon all the papers and proceedings heretofore had herein, the defendant U. S. Department of Housing and Urban Development and Federal Housing Administration will move this court, before the Honorable Thomas C. Platt in Courtroom No. 7 at the Federal Courthouse, 225 Cadman Plaza East, Brooklyn, New York on the 15th day of November, 1974 at 10:00 o'clock in the morning, or as soon thereafter as counsel may be heard, for an order dismissing this action, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that the suit is barred by the sovereign immunity of the federal defendants and for such other and different relief as to the court seems just and proper.

Dated: Brooklyn, New York
November , 1974

Yours, etc.,

DAVID G. TRAGER
United States Attorney Eastern District
of New York

Attorney for Defendants

By: /s/ DOUGLAS J. KRAMER
Assistant U. S. Attorney

Notice of Motion

To:

Wasserman, Chinitz, Geffner & Green, Esqs.
Attorneys for Plaintiff
5000 Brush Hollow Road
Westbury, New York 11590

Cravath, Swaine & Moore, Esqs.
Attorneys for Defendant Chemical Bank
1 Chase Manhattan Plaza
New York, New York

South Haven Houses Housing Development
Fund Co., Inc.
369 East 149th Street
Bronx, New York

Affidavit of Douglas J. Kramer in Support of Motion.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK

State of New York,
County of Kings, ss:

DOUGLAS J. KRAMER, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of David G. Trager, United States Attorney and I am fully familiar with the facts set forth herein.

2. I make this affidavit in support of the motion by the federal defendants to dismiss this action on the grounds of sovereign immunity.

3. This action was commenced in New York State Supreme Court for the County of Nassau and was subsequently removed to Federal District Court on October 3, 1974 by the federal defendants.

4. As is more fully set forth in the annexed memorandum of law, plaintiff has alleged a number of causes of action against the federal defendants that sound in tort and contract. While not expressly alleged, it would appear that plaintiff is relying on the "sue or be sued" clause in Title 28 U. S. C. §1702 as a waiver of sovereign immunity. It is the position of the federal defendants that this clause does not waive sovereign immunity to suit for the causes of action alleged by the plaintiff and thus the action must be dismissed.

WHEREFORE, it is requested that the motion of the federal defendants to dismiss the action be granted, together with costs and disbursements herein.

(Sworn to by Douglas J. Kramer, Assistant U. S. Attorney, November 1, 1974.)

Affidavit of Theodore Geffner in Opposition.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK

State of New York,
County of Nassau, ss:

THEODORE GEFFNER, being duly sworn, deposes and says:

I am Secretary of Modular Technics Corp., the plaintiff herein. I am fully familiar with the matters herein-after set forth and make and submit this affidavit in opposition to the motion to dismiss the complaint.

Annexed hereto as Exhibit "A" is a copy of the contract negotiated at the offices of the government with the representatives of the government. Incorporated by reference into the contract are the "Specifications" for the project which provides not only for the signature of the owner and contractor but also for that of the Federal Housing Administration.

The court's attention is respectfully directed to the fact that the form of contract and form of specifications are those of the government. In addition, as can be seen, the government had the exclusive right of inspection, approval and rejection of all work performed and materials supplied; the exclusive right to determine when the project was complete; the exclusive right to determine when the project could be occupied; the exclusive right to interpret Contract Documents and determine compliance therewith; the exclusive right to determine what, if any, changes could be made in the plans and specifications; and the exclusive right, with the Lender, to determine when and how much the plaintiff would receive for its work and material.

In every way and in every respect the government was intimately and directly involved in the making and performance of the contract. As evidence thereof is the fact

Affidavit of Theodore Geffner in Opposition

that, upon information and belief the owner has defaulted and the government has taken over and assumed all control of the project.

Concomitant with the aforesaid rights were various duties and obligations which the government failed to perform as more particularly set forth in second, third, fourth, ninth, and tenth causes of action set forth in the complaint.

Each breach of obligation by the government has as its source the contract between the parties and the wrongs claimed are derived from such breaches of contractual obligations.

It should be noted that in the contract and other of the various documents between the parties, the governmental corporate entities referred to are the U. S. Department of Housing and Urban Development and the Federal Housing Administration and the administrator referred to is the Commissioner.

In the event that this court denies the government's motion and find that the names of the government defendants require change it is respectfully suggested that either a stipulation be entered into amending the title or that the plaintiff be allowed to plead over and serve a new summons with the appropriate title.

WHEREFORE, it is respectfully requested that the government's motion be denied in every respect, or that plaintiff be granted such other and further relief as may be just in the premises.

(Sworn to by Theodore Geffner, January 23, 1975.)

Exhibit A, Annexed to Complaint—Construction Contract.

U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

FEDERAL HOUSING ADMINISTRATION

Construction Contract—Cost Plus

THIS AGREEMENT, made the 2nd day of Aug. 1972, by and between Modular Technics Corporation (hereinafter called the "Contractor") and South Haven Houses Development Fund Company, Inc. (hereinafter called the "Owner").

WITNESSETH, That the Contractor and the Owner, for the consideration hereinafter set out, agree as follows:

Article 1—Scope of Contract

A. The Contract between the parties is set forth in the "Contract Documents", which consist of this Agreement, the Drawings and Specifications, to which are attached the current edition of AIA Document A201, "General Conditions of the Contract for Construction", and FHA Form No. 2554, "Supplementary Conditions of the Contract for Construction". The provisions of this instrument and the said FHA Supplementary Conditions take precedence over all inconsistent provisions in the said AIA General Conditions. Any provision in said AIA General Conditions whereby the undersigned waive all rights against each other for damages caused by fire and other perils covered by insurance shall be inapplicable. This Contract constitutes the entire agreement between the parties, and any previously existing contract concerning the work contemplated by the Contract Documents is hereby revoked.

B. The Contractor shall furnish all of the materials and perform all of the work (within the property lines) shown

Exhibit A, Annexed to Complaint

on, and in accordance with, the Drawings and Specifications entitled South Haven Houses FHA Project No. 012-44028-NP-SUP (Reissued) dated See Attached Schedule

C. The Drawings, which are numbered See Attached Schedule, and the Specifications, the pages of which are numbered See Attached Schedule, have been prepared by Castro-Blanco-Piscioneri and Feder. The Architect administering the Construction Contract (hereinafter, and elsewhere in the Contract Documents, referred to as the "Architect") is Castro-Blanco-Piscioneri and Feder

D. A master set of said Drawings and Specifications, identified by the parties hereto and by the Design Architect, the Architect, and the Contractor's Surety or Guarantor have been placed on file with the Federal Housing Commissioner (hereinafter referred to as the "Commissioner"), and shall govern in all matters which arise with respect to such Drawings and Specifications.

E. Changes in the Drawings and Specifications or any terms of the Contract Documents, or orders for extra work, or changes by altering or adding to the work, which will result in any net construction cost increase, or will change the design concept, or which will result in a net cumulative construction cost decrease of more than 2% of the contract amount may be effected only with the prior written approval of the Owner's Lender (more particularly identified below and hereinafter referred to as the "Lender") and the Commissioner and under such conditions as either the Lender or the Commissioner may establish.

Article 2—Time

A. The work to be performed under this Contract shall be commenced within 15 days of this Agreement, and

Exhibit A, Annexed to Complaint

shall be completed by Nov. 30, 1973. The time by which the work shall be completed may be extended in accordance with the terms of the said AIA General Conditions only with the prior written approval of the Commissioner.

B. The Contractor shall correct any defects due to faulty materials or workmanship which appear within one year from the date of substantial completion.

C. If the work is not substantially completed in accordance with the Drawings and Specifications, including any authorized changes, by the date specified above, or by such date to which the contract time may be extended, the maximum sum stated in Article 3A(1) below shall be reduced by \$1,303.01 as liquidated damages, for each day of delay until the date of substantial completion. The total of any such liquidated damages shall be reduced by an amount equal to the project's net operating income (as defined and determined by the Commissioner) for the period upon which liquidated damages are based. (illegible.)

Article 3—Payments

A. (1) Subject to the provisions hereinafter set out, the Owner shall pay to the Contractor for the performance of this Contract the following items in cash:

(a) The actual cost of construction as defined in Article 10 below; plus

(b) A fee of \$218,566.00

In no event, however, shall the total cash payable pursuant to this paragraph (1) exceed \$4,724,083.00

(2) In addition to any cash fee provided for in paragraph (1) Owner shall pay to the Contractor by means other than cash, the following:

Exhibit A, Annexed to Complaint

(a) A note in form prescribed by the Commissioner in the amount of \$

(b)

(3) If, upon completion, the Contractor shall have received cash payments in excess of (a) the actual cost of construction, plus (b) the cash fee specified in paragraph (1), plus the additional amount to be paid under the provisions of paragraph (3), all such excess shall be refunded to the Owner.

See attached Incentive Rider

B. Each month after the commencement of work hereunder, the Contractor shall make a monthly request for payment (in quadruplicate on FHA Form No. 2448) by the Owner for work done during the preceding month. Each request for payment shall be filed at least Five days before the date payment is desired. Subject to the approval of the Lender and the Commissioner, the Contractor shall be entitled to payment thereon in an amount equal to (1) the total value of classes of the work acceptably completed; plus (2) the value of materials and equipment not incorporated in the work, but delivered to and suitably stored at the site; less (3) 10 percent holdback and less prior payments. The "values" of both (1) and (2) shall be computed in accordance with the amounts assigned to classes of the work in the "Contractor's and/or Mortgagor's Cost Breakdown", attached hereto as Exhibit "A". The Contractor agrees that no materials or equipment required by the Specifications will be purchased under a conditional sale contract or with the use of any security agreement or other vendor's title or lien retention instrument.

C. The balance due the Contractor hereunder shall be payable upon the expiration of 30 days after the work hereunder is fully completed, provided the following have occurred:

Exhibit A, Annexed to Complaint

(1) All work hereunder requiring inspection by municipal or other governmental authorities having jurisdiction has been inspected and approved by such authorities and by the rating or inspection organization, bureau, association or office having jurisdiction;

(2) All certificates of occupancy, or other approvals, with respect to all units of the project have been issued by State or local governmental authorities having jurisdiction; and

(3) Permissions to occupy (FHA Form No. 2485) for all units of the project have been issued by the Commissioner.

D. With its final application for payment by the Owner, the Contractor shall disclose, on a form prescribed by the Commissioner, all unpaid obligations contracted in connection with the work performed under this Contract. The Contractor agrees that within 15 days following receipt of final payment, it will pay such obligations in cash and furnish satisfactory evidence of such payment to the Owner.

Article 4—Receipts & Releases of Liens

The Owner may require the Contractor to attach to each request for payment its acknowledgement of payment and all subcontractors' and materialmen's acknowledgements of payment for work done and materials, equipment and fixtures furnished through the date covered by the previous payment. Concurrently with the final payment, the Owner may require the Contractor to execute a waiver or release of lien for all work performed and materials furnished hereunder, and may require the Contractor to obtain similar waivers or releases from all subcontractors and materialmen.

Exhibit A, Annexed to Complaint

Article 5—Requirements of Contractor

A. The Contractor shall furnish, at its own expense, all building and other permits, licenses, tools, equipment and temporary structures necessary for the construction of the project. The Contractor shall give all required notices and shall comply with all applicable codes, laws, ordinances, rules and regulations, and protective covenants, and with the current regulations of the National Board of Fire Underwriters, wherever applicable. The Contractor further shall comply with the provisions of the "Manual of Accident Prevention in Construction" of the Associated General Contractors of America. The Contractor shall immediately notify the Commissioner of the delivery of all permits, licenses, certificates of inspection, certificates of occupancy, and any other such certificates and instruments required by law, regardless of to whom issued, and shall cause them to be displayed to the Commissioner upon his request.

B. If the Contractor observes that the Drawings and Specifications are at variance with any applicable codes, laws, ordinances, rules or regulations, or protective covenants, it shall promptly notify the Architect in writing, and any necessary changes shall be made as provided in this Contract for changes in the Drawings and Specifications. If the Contractor performs any work knowing it to be contrary to such codes, laws, ordinances, rules or regulations, or protective covenants, without giving such notice to the Architect, it shall bear all costs arising therefrom.

C. Upon completion of construction, the Contractor shall furnish to the Owner a survey showing the location on the site of all improvements constructed thereon, and showing the location of all water, sewer, gas and electric lines and mains, and of all existing utility easements.

Exhibit A, Annexed to Complaint

Such survey shall be prepared by a licensed surveyor who shall certify that the work is installed and erected entirely upon the land covered by the mortgage and within any building restriction lines on said land, and does not overhang or otherwise encroach upon any easement or right-of-way of others. In addition, if the Owner shall so require, the Contractor shall furnish a survey with each application for payment for any improvements, including structures and utilities, not theretofore located on a survey.

D. The Contractor shall assume full responsibility for the maintenance of all landscaping which may be required by the Drawings and Specifications until such time as both parties to this Contract shall receive written notice from the Commissioner that such landscaping has been finally completed. The Owner agrees to make available to the Contractor, for such purpose, without cost to the latter, such facilities as water, hose and sprinkler.

Article 6—Assurance of Completion

The Contractor shall furnish to the Owner assurance of completion of the work in the form of 50% Performance Bond and 50% Payment Bond. Such assurance of completion shall run to the Owner and the Lender as obligees and shall contain a provision whereby the surety agrees that any claim or right of action that either the Owner or the Lender might have thereunder may be assigned to the Commissioner.

Article 7—Waiver of Lien or Claim

The Contractor shall file no mechanic's or materialman's lien or maintain any claim against the Owner's real estate or improvements for or on account of any work done, labor performed or materials furnished under this Contract.

Exhibit A, Annexed to Complaint

Article 8—Right of Entry and Interpretation

A. The Lender and its agents or assigns and the Commissioner and his agents shall, at all times during construction, have the right of entry and free access to the project and the right to inspect all work done and materials, equipment and fixtures furnished, installed or stored in and about the project. For such purpose, the Contractor shall furnish such enclosed working space as the Lender or Commissioner may require and find acceptable as to location, size, accommodations and furnishings.

B. The Commissioner shall also have the right to interpret the Contract Documents and to determine compliance therewith.

Article 9—Assignments, Subcontracts and Termination

A. This Contract shall not be assignable by either party without the prior written consent of the other party, the Lender and the Commissioner, except that the Owner may assign the Contract, or any rights hereunder, to the Lender or the Commissioner.

B. The Contractor shall not subcontract all of the work to be performed hereunder without the prior written consent of the Owner, the Lender and the Commissioner.

(Illegible.)

D. The Contractor understands that the work under this contract is to be financed by a building loan to be secured by a mortgage and insured by the Commissioner, and that the terms of said loan are set forth in a Build-

Exhibit A, Annexed to Complaint

ing Loan Agreement between the Owner as Borrower and Chemical Bank as Lender. The Contractor further understands that said Building Loan Agreement provides that, in the event of the failure of the Owner to perform its obligations to the Lender thereunder, the Lender may, as attorney-in-fact for the Owner, undertake the completion of the project in accordance with this Contract. In the event the Lender elects not to undertake such completion, the Contractor's obligations under this contract shall terminate.

Article 10—Certification of Actual Cost

A. The "actual cost of construction", as used in Article 3 above, shall include all items of cost and expense incurred by the Contractor in the performance of this Contract, including costs and expenses of labor, materials for construction, equipment and fixtures, field engineering, sales taxes, workmen's compensation insurance, social security, public liability insurance, job overhead and all other expenses directly connected with construction, and including general overhead expenses, but excluding kick-backs, rebates or discounts received or receivable in connection with the construction of the project; and excluding any return on or cost of the Contractor's working capital, such return on or cost of working capital being a part of or to be paid from the Contractor's fee or profit.

B. The Contractor shall keep accurate records of account of the said actual cost of construction, and shall, upon demand, make such records and invoices, receipts, subcontracts and other information pertaining to the construction of the project available for inspection by the Owner and the Commissioner.

Exhibit A, Annexed to Complaint

C. With its final application for payment, the Contractor shall furnish to the Owner a completed "Contractor's Certificate of Actual Cost", which shall be accompanied and supported by an independent public accountant's certificate as to actual cost (in form acceptable to the Commissioner).

D. The Contractor shall include in all subcontracts, equipment leases and purchase orders a provision requiring the subcontractor, equipment lessor or supplier to certify its costs incurred in connection with the project, in the event the Commissioner determines there is an identity of interest between either the Owner or the Contractor and any such subcontractor, equipment lessor or supplier.

Article 11

In addition to all other conditions heretofore set forth it is further agreed by Owner and General Contractor that there shall be no changes in the plans or specifications, nor change orders requested or approved by either Owner or General Contractor except that this prohibition shall not apply to changes necessary to compensate for (a) (Illegible.) site conditions not reflected by the plans; (b) requirement of any governmental agency not reflected in the plans or specifications, but if the requirement of the governmental agency applies to structural or mechanical aspects and such structural or mechanical requirement existed on date hereto, compliance therewith shall not be the basis for a change order.

All change orders shall require approval of the Housing and Development Administration, Office of Housing Sponsorship as to compliance with the above provisions and the reasonableness of the cost therewith prior to the exe-

Exhibit A, Annexed to Complaint

cution of the work. The preceding approval shall be in addition to any and all approvals required by HUD.

SOUTH HAVEN HOUSES HOUSING DEVELOPMENT
FUND COMPANY, Inc.

by (Illegible.)

MODULAR TECHNICS CORPORATION
by (Illegible.)

Attest:
(Illegible.)

Attest:
(Illegible.)

U. S. DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT

FEDERAL HOUSING ADMINISTRATION

CONSTRUCTION CONTRACT

INCENTIVE PAYMENT

Rider to Contract between Modular Technics Corporation and South Haven Houses Housing Development Fund Company, Inc.

In any case where there is no identity of interest between the Owner and the Contractor, the parties may amend the Construction Contract to provide for the payment of an additional sum to the Contractor as an incentive for completing the project earlier than the completion date specified in the contract.

The Construction Contract—Cost Plus—(FHA Form No. 2442-A) may be amended by striking paragraph A(3) from Article 3 and adding the following paragraphs by rider:

Exhibit A, Annexed to Complaint

Article 3—Payments (cont.)

(3) If the work is completed prior to the time for completion specified in this contract, the Owner shall make an incentive payment to the Contractor. The amount of the payment shall be ascertained according to the instructions on the attachment entitled Incentive Payment Computation which is made a part hereof.

(4) In no event shall the cash fee specified in paragraph (1), plus any amounts specified in paragraph (2) to be paid by means other than cash, plus any incentive payment under the provisions of paragraph (3) exceed \$552,801.00***.

(5) If, upon completion, the Contractor shall have received cash payments in excess of (a) the actual cost of construction, plus (b) the cash fee specified in paragraph (1), plus the incentive payment under the provisions of paragraph (3), all such excess shall be refunded to the Owner.

(To Be Attached To Construction Contract Cost Plus, FHA Form 2442-A In All Cases Where Parties Choose To Use The Incentive Payment Rider)

Step 1

- (a) Enter FHA's estimated cost of interest, real estate taxes, insurance and MIP which amount is the sum of items 53, 54, 55 and 56 of Section G, Form 2264. \$ 399,313.00

***The amount is to be computed by subtracting the amount on line 44 from the amount of line 69 of Section G, Form 2264, and multiplying the result by 10 percent.

Exhibit A, Annexed to Complaint

- (b) Enter the certified actual cost of these items as approved by the Commissioner from date of initial endorsement through the 30th day after the FHA Chief Underwriter signs the final inspection report. \$
- (c) Subtract (b) from (a). If (b) exceeds (a) enter 0. \$

Step 2

- (a) Enter *Lesser* of (1) FHA's estimated cost of physical construction which amount is the sum of items 36(c), 41, 42, 43, 47 and 48 of Section G, Form 2264 or (2) Cash Upset price less the cash fee set out in Article 3(a) of the Construction Contract \$4,505,517.00
- (b) Enter the FHA's estimated amount of the net cost or decrease in cost of approved construction changes from item 2(c) of the last FHA Form 2437. \$
- (c) Enter sum of (a) and (b) if approved change-orders result in construction cost increase. If approved changes result in a decrease subtract (b) from (a). and enter difference. \$

Exhibit A, Annexed to Complaint

(d) Enter actual certified cost
of physical construction as
approved by the Commis-
sioner. \$

If (c) exceeds (d) enter dif-
ference here. \$

If (d) exceeds (c) enter 0.

Step 3

To obtain incentive payment
add the last entries in step
1 and 2 and multiply by
50%.* \$

*This blank should be completed on or before initial closing
of the loan and the percentage to be inserted must not exceed
50%.

Opinion and Order.**UNITED STATES DISTRICT COURT,****EASTERN DISTRICT OF NEW YORK.**

November 18, 1975

PLATT, D. J.:

This is an action arising out of a contract between plaintiff, a building contractor, and defendant South Haven Houses Housing Development Fund Company, Inc. Plaintiff agreed to construct certain buildings in Bronx County for South Haven. Defendant Chemical Bank appears to have agreed to loan moneys to South Haven. The federal defendants, the Department of Housing and Urban Development (HUD) and the Federal Housing Administration (FHA), allegedly agreed to insure the loan.

Plaintiff has set out in its complaint eleven causes of action, and apparently seeks judgment against HUD and FHA on five of them. Two causes of action (numbers two and three in the complaint) claim that plaintiff performed certain work, labor, and services and furnished materials at the special instance and request of defendants, and has not received compensation.

The fourth cause of action alleges that FHA represented and warranted that plaintiff could successfully perform its obligations in certain ways; that plaintiff relied on the existence of conditions as warranted; that the conditions were not as warranted; and that, as a result, plaintiff suffered uncompensated losses.

The ninth cause of action suggests that FHA acted as an agent or quasi-agent for South Haven; that FHA represented that certain additional compensation would be paid to plaintiff; that these representations induced plaintiff to enter the contract; that FHA knew extra compensation would not be forthcoming; that HUD and FHA

Opinion and Order

caused, by duress, plaintiff to fail to submit applications for extra compensation; and that plaintiff has thereby been damaged.

The tenth cause of action alleges that FHA was a quasi-agent of South Haven; that FHA knew material facts concerning certain expenses; that FHA by non-disclosure of these facts to plaintiff represented the non-existence of these facts; that plaintiff relied on these representations in deciding to enter the contract; and that plaintiff has been damaged because of the false representations.

Defendants HUD and FHA have made a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the grounds that sovereign immunity bars this action. The Court agrees, and finds it unnecessary to consider the government's contention that in any event the Secretary of HUD, not HUD or FHA, is the proper party to represent the federal government in a suit of this nature. Nor need we decide whether this suit was properly brought in this Court, see 28 U.S.C. §§1346 and 1491.

I

It appears at first blush that plaintiff's fourth, ninth and tenth causes of action speak in tort, not in contract. All three allege that certain representations or warranties were made by representatives of the government; that these representations were false; and that as a consequence of the misrepresentations plaintiff suffered injury. We note at the outset that plaintiff cannot maintain a cause of action in tort against the government under these circumstances.

We start with the axiom that the United States as sovereign may not be sued without its consent, e. g., *Honda v. Clark*, 386 U. S. 484 (1967); *Keifer & Keifer*

Opinion and Order

v. Reconstruction Finance Corp., 306 U. S. 381 (1939); *Minnesota v. Hitchcock*, 185 U. S. 373, 386 (1902). When consent is given, limitations and conditions upon that consent must be strictly observed, *Honda v. Clark, supra*; *Soriano v. United States*, 352 U. S. 270 (1957); *United States v. Sherwood*, 312 U. S. 584 (1941).

The government has waived immunity against some tort claims in the Federal Tort Claims Act. But the Act is of no help to plaintiff, since one section (28 U.S.C. §2680) exempts from its coverage:

"h). Any claim arising out of * * * misrepresentation, deceit, or interference with contract rights."

If plaintiff's claims are read to speak in tort, they are barred as a consequence of these exceptions to the waiver of immunity, and must be dismissed.

II

Perhaps as a consequence of the government's failure to waive tort immunity in misrepresentation cases, plaintiff suggests that all five relevant claims alleged by it actually sound in contract. We proceed to consider whether, under the circumstances of this case, suit for breach of contract will lie against the government.

Plaintiff alleges that the government was a party to the contract between plaintiff and South Haven. That contract set forth the rights and duties of the contractor and the owner in the construction of certain buildings. While neither HUD nor FHA appears on the face of the contract to be a party, plaintiff alleges that government representatives were so intimately linked to the contract that an implied contract between the government and plaintiff resulted. It is this implied contract, according to the plaintiff, that gave rise to duties (for example the

Opinion and Order

duty not to misrepresent) which the government has not fulfilled. Plaintiff further suggests that the government has waived sovereign immunity as to contract claims, and that this action may therefore be maintained.

Plaintiff's theory suggests difficult problems of contract law. The Court need not, however, consider these problems. For even if we assume that representatives of the government acted as plaintiff has alleged, the simple fact is that they were not authorized so to act, and Congress has not waived immunity against suits for damages arising from such actions.

In setting forth the powers of the Secretary of HUD in Chapter 13 of Title 12 of the United States Code, Congress provided that

"The Secretary shall, in carrying out the provisions of this subchapter and subchapters II, III, V, VI, VII, VIII, X, IX-A, and IX-B, of this chapter, be authorized in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal." 12 U.S.C. §1702.

In other words, the Secretary may sue or be sued for actions of his department authorized in the cited subchapters. Sovereign immunity is not waived as to other activities. The question thus is reduced to this: are the activities alleged in the complaint authorized by the cited subchapters?

The Court must answer this question in the negative. Congress did provide for insurance of mortgages by HUD in many sections of Title 12. If HUD should fail to live up to a mortgage agreement, the language of 12 U.S.C. §1702 means that the Department can be sued in the same way any other insurer can be sued. Congress feared that in the absence of such language financial institutions would hesitate to make insured loans, *Korman v. Federal Housing Administrator*, 113 F. 2d 743 (D. C. Cir. 1940); *In re Wilson*, 23 F. Supp. 236 (N. D. Texas 1938).

Opinion and Order

But the contract for which, according to plaintiff, HUD and FHA should be held responsible is not a mortgage insurance contract. It is instead a contract to construct buildings. The Court can find no part of the relevant subchapters of Title 12 which in any way authorizes any government official to enter into a construction contract. Nor does plaintiff cite any such section; his brief merely refers to "§1701 *et seq.*"

Contracts to insure mortgages and contracts to build buildings are of course very different things. This Court holds that the alleged actions of the federal government's representatives cannot be deemed actions "carrying out the provisions of" the relevant subchapters. Therefore, the government's waiver of sovereign immunity in 12 U.S.C. §1702 is inapplicable, and this action cannot be maintained.

The Court notes, finally, that a dispute has arisen between the parties as to the import of the injunction of *FHA, Region No. 4 v. Burr*, 309 U. S. 242 (1940), that waivers of governmental immunity must be liberally construed. The Supreme Court did not, in that decision, reverse its many holdings that courts must construe strictly the *substantive* areas covered by waivers of sovereign immunity. Courts must still, even after *Burr*, permit suits against the government only for activities that are clearly covered by a waiver. What *Burr* held was that *in an area clearly covered*, courts will liberally construe what *procedural* devices can be employed against the government. In *Burr*, for example, a wage claim against the government was the basis of the suit. In that area, there has been a clear waiver of immunity. The question was, could garnishment of the wages be effected by a creditor of the government employee, and the Court held that it would liberally construe the waiver of immunity (in this clearly covered substantive area) so as to permit the use of this procedural device. Said the Court,

Opinion and Order

Clearly the words 'sue and be sued' in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings. * * * To say that Congress did not intend to include such civil process [as garnishment] in the words 'sue and be sued' would in general deprive suits of some of their efficacy. 309 U. S. at 245-46.

It is worthy of note that the Supreme Court's authority for its comment that waivers are to be liberally construed is *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381 (1939), in which the question was again a procedural one, involving whether a tort or a contract label was to be given to a claim against a government agency arising out of agency contracts made "in due exercise of its powers," 306 U. S. at 387. If the action was denominated a tort action, it would be barred; if it was called a contract action, it would not be. Neither label would have been inappropriate, so the Court chose to allow this suit.

In the case before this Court, of course, we are faced with an action that is barred under either label. The procedural question is not determinative. Here we must define the substantive area to which Congress intended that its waiver of immunity should apply. Congress did not waive immunity as to those unauthorized actions which plaintiff alleges that government employees performed. Nothing in this conclusion is inconsistent with the Supreme Court's opinions in *Burr* and *Keifer*.

In any event, whether waivers are to be construed liberally or strictly, the only possible construction that can be placed on the "sue or be sued" clause of 12 U.S.C. §1702 is that it does not comprise a waiver of immunity against suits for activities not authorized in the cited

Opinion and Order

subchapters. The doctrine of sovereign immunity may at times work hardship on private individuals, but it is not within the province of this Court to challenge a doctrine so firmly entrenched both in statutory law and in case law.

III

It follows from the preceding discussion that plaintiff's claims against HUD and FHA cannot be maintained either on a tort theory or on a contract theory, as a consequence of the government's sovereign immunity. Therefore the government's motion to dismiss must be granted.

So ORDERED.

THOMAS C. PLATT
U. S. D. J.

43a

Order.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

On the prior order of this court dated November 18, 1975, it appearing to the court that there is no just reason for delay in entering final judgment dismissing the complaint as to the defendants, U. S. Department of Housing & Urban Development and Federal Housing Administration it is, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,

Ordered, that final judgment be entered herein that the complaint be dismissed as to the defendants, U. S. Department of Housing & Urban Development and Federal Housing Administration.

Dated: Brooklyn, N. Y.
January 22, 1976

s/ THOMAS C. PLATT
United States District Judge

Judgment.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

An order having been entered herein on November 18, 1975 for dismissal of the complaint of the plaintiff against the defendants, United States Department of Housing & Urban Development and Federal Housing Administration and the court having certified that there was no just reason for delay, and expressly directing the entry of final judgment, it is

Adjudged that the complaint against the defendants, United States Department of Housing & Urban Development and Federal Housing Administration be and the same are hereby dismissed.

Dated: Brooklyn, N. Y.
January 22, 1976

s/ LEWIS ORZEL
Clerk

by s/ THOMAS B. COSTELLO
Deputy Clerk

Notice of Appeal.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

Notice Is Hereby Given that Modular Technics Corp., plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment dated, January 22, 1976 and filed in the office of the Clerk of the United States District Court, Eastern District on January 22, 1976 dismissing the complaint as to the defendants, United States Department of Housing and Urban Development and Federal Housing Administration, and from each and every part thereof.

Dated: January 23, 1976.

WASSERMAN, CHINITZ, GEFFNER & GREEN

by: Edwin L. Wolf

Member of the Firm

Office & P. O. Address

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To:

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U. S. ATTORNEY

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J. J. Moore

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Attorney for